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No. 06-250

Supreme Court, U.S.
FILED
SEP 22 2006

In The

Supreme Court of the United States

OPERATORS CONSULTING SERVICES, INC. AND ZURICH AMERICAN INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DANOS & CUROLE MARINE CONTRACTORS, INC., THE GRAY INSURANCE COMPANY, AND JAMES MORRISON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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LIST OF PARTIES AND DESIGNATION OF CORPORATE RELATIONSHIPS

The Respondents, Danos & Curole Marine Contractors, Inc. and The Gray Insurance Company do not have any parent companies.

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SUMMARY OF THE ARGUMENT

The Fifth Circuit in its Decision correctly applied the Last Responsible Employer Rule, and did so in a manner consistent with the other Circuit Courts, which have applied this rule. They were correct in concluding that the Decision of the Administrative Law Judge was supported by substantial evidence as a whole and was in accordance with the law.

ARGUMENT

A. Statement of Facts

The Statement of Facts as presented by the Petitioners is misleading and erroneous. On October 16, 1997 the claimant, James Morrison, sustained a severe injury to his lumbar spine while working for OCS. He performed light duty for a limited period of time than resumed his regular duties. When he resumed his regular duties, he took extra precautions to avoid reinjuring his back. He worked smarter and more cautiously. His functional capacity was effected by that injury, but he did his job anyway. In March, 1998, while still working for OCS, he developed sciatic symptoms of the left leg. Because these symptoms persisted, he returned to the treating physician, Dr. Gramlich. This return visit was in May, 1998, after he had begun working for Danos & Curole. Because of these symptoms, which began prior to his employment with Danos and which were caused by his injury with OCS, Dr. Gramlich resumed treatment on a regular basis, while he continued to work. Dr. Gramlich testified that, because the symptoms persisted and were not resolved by September of 1998, a neurosurgical consultation was indicated, and she referred him to a neurosurgeon, Dr. Wilson. Dr. Wilson

suggested that he stop working for a while and the claimant followed his suggestion. At that time Dr. Wilson said the claimant was robust, in good shape and tough looking. The claimant did not return to work after that. After that, in spite of not working, his condition deteriorated to the point that he had to undergo lumbar surgery. This was in 2001, at which time Dr. Wilson noted that the claimant looked debilitated and markedly aged and was in severe pain and exhibited additional symptoms.

The petitioners are distorting the testimony of Doctor Wilson when the say he testified that the claimant would not have needed surgery had he stopped work in April, before he went to work for Danos. He actually testified that he could not testify to that. The counsel for OCS asked that same question later on re-direct and the Doctor told him that he was not of that opinion. He stated quite clearly he could not agree with such a conclusion. Throughout his testimony, he made it repeatedly clear that his opinion was that the claimant's condition was a natural progression of the injury sustained with OCS in October of 1997. It was a continuum and it was not a result of any aggravation while working for Danos. A review of Dr. Gramlich's entire testimony shows that she was of the same opinion, that is, that the claimant's disability was a result of the natural progression of the injury sustained by the claimant while working for Operators and Consulting Services, the first employer. The claimant's testimony and other evidence supported that same conclusion.

B. The Fifth Circuit Correctly Applied the Last Employer Rule

The sole contention made by the petitioners is that the Fifth Circuit in its Decision applied the "last employer

rule" differently than the Ninth and Third Circuit Courts, and is, therefore in conflict with them. In reading the Fifth Circuit's Decision, one clearly sees that the rule applied by them is the exact same rule as the one applied by those and other Circuits. Furthermore, it is equally clear that they applied that rule in the same exact way that the other Circuits applied it.

The petitioners assert that the Fifth Circuit's Decision is in conflict with three Decisions of the Ninth Circuit and one case of the Third Circuit. This is not the case. The petitioners contend that these cases are factually the same as this case. That is wrong. The cases in some ways are factually similar, but they are in other ways very different. The major difference is that in each of the four cases cited the substantial evidence in those records as a whole supported a conclusion that the subsequent employment aggravated an earlier injury resulting in the disability suffered by the claimant's thus imposing liability on that subsequent employer. In this case the substantial evidence in the record as a whole supported a conclusion that the claimant's disability was solely the result of a natural progression of the injury that occurred while the claimant was in the employ of the first employer, Operators and Consulting Services.

The issues raised by the petitioners are more semantic than, substantive. They state that the Court below suggested that the issue for consideration is whether the claimant experienced a "traumatic event". The Fifth Circuit did not use that expression. If they had, it would not have made a difference, since a traumatic event is simply an injurious event. The Fifth Circuit as well as the Ninth, the Third and other Circuits have used the word, "trauma" in discussing the aggravation rule. This is because trauma is a

synonym of injury. (Dorland's Illustrated Medical Dictionary 25th Edition) The petitioners are also suggesting that when an employee experiences pain on the job, the courts should assume that he has experienced not only an injury, but a disabling injury. The Courts cannot make such assumptions. That is why they look closely at the evidence and especially the medical evidence. According to Dorland's pain is

> A more or less localized sensation of discomfort or distress, or agony, resulting from the stimulation of specialized nerve endings. It serves as a protective mechanism insofar as it induces the sufferer to remove or withdraw from the source.

It is a symptom. Drs. Wilson and Gramlich testified that the pain experienced by Morrison were manifestations of the harm or damage caused by the accident with OCS and were not an indication of further damage or harm.

As the Fifth Circuit pointed out the last employer rule refers to occupational disease cases as well as to non-occupational disease cases. The latter involve cumulative or aggravating traumas and these cases are referred to by the Courts as "two-injury" cases. In such cases for the second or last employer to be liable, there must be shown by the substantial evidence on the record as a whole that additional damage occurred and it was such that it resulted in disability. If it is a result of the natural progression of the original injury, the first employer is liable. This is exemplified, as pointed out by the Court, in a Fourth Circuit Decision. In that Decision the Fourth Circuit affirmed an administrative Law Judge's ruling that a flare-up of symptoms while in the employ of a subsequent employer was not a second trauma. It was according to the evidence simply an onset of complications from the first

trauma, thus the first employer was the liable employer. App. 8 (footnote) *Admiralty Coatings Corp. v. Emery,* 228 F. 3d 513, 518 (4th Cir.2000). That flare up did not aggravate the earlier injury or cause greater harm and it was not the cause of the subsequent disability.

CONCLUSION

The Courts below have recognized what the petitioners fail to acknowledge. It is that the Administrative Law Judge's finding, that the claimant's disabling back condition was due to the natural progression of his October 16, 1977 injury with OCS and that OCS was the responsible employer was reasonable in light of the evidence, was supported by substantial evidence and was in accordance with the law and consistent with the applicable legal principles. The lower appeals courts were correct in affirming the Decision of the Administrative Law Judge. Most importantly for the consideration of this Honorable Court is the fact that the applicable rule of law was applied by the Fifth Circuit in its Decision below in a manner consistent with the way in which the other Circuit Courts apply it. As such this Honorable Court Must do the same and dismiss the Writ as being without merit.

Respectfully submitted,

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